86-988

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

L. D. JAMESON,

Petitioner,

vs.

BETHLEHEM STEEL CORPORATION PENSION PLAN OF BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES, also known as BETHLEHEM 1977 SALARIED PENSION PLAN, GENERAL PENSION BOARD, BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN R. VINTILLA
150 Plaza West Building
20220 Center Ridge Road
Cleveland, Ohio 44116
(216) 333-9955

Counsel for Petitioner

QUESTIONS PRESENTED

1. MAY A PENSION PLAN ADMINISTRATOR DENY BENEFITS FOR COVERED EMPLOYMENT UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA), SECTION 203(a)(b)(F), 29 U.S.C. SECTION 1053 (a)(b)(F), ON THE BASIS OF A PRE-ERISA BREAK-IN-SERVICE POLICY SEPARATE FROM THE QUALIFIED PLAN IN EFFECT AT THE APPLICABLE TIME AND WHERE THE BREAK-IN-SERVICE RULES OF THE PLAN IN FORCE WHEN THE APPLICATION FOR PENSION WAS MADE DID NOT CONTAIN THE POLICY OR EXPRESSLY REFER TO IT.

2. WHETHER A PRE-ERISA COMPANY POLICY OUTSIDE OF THE QUALIFIED PENSION PLAN IN EFFECT, WHEREBY AN EMPLOYEE SUFFERS A BREAK IN SERVICE AND THEREBY LOSES ACCRUED PENSION CREDITS FOR FAILURE TO REPAY A SEVERANCE ALLOWANCE WHICH WAS DUE HIM UPON TERMINATION OF EMPLOYMENT AT ONE FOREIGN OPERATION OF THE COMPANY AND TRANSFER TO ANOTHER IS AN EMPLOYEE PENSION PLAN UNDER SECTION 3(3), (2)(A) OF ERISA, 29 U.S.C. SECTION 1002(3), (2)(A), (1982).

PARTIES TO PROCEEDING

The parties to this proceeding are the following: L. D. Jameson and Bethlehem Steel Corporation Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies, also known as Bethlehem 1977 Salaried Pension Plan, General Pension Board, Bethlehem Steel Corporation and Subsidiary Companies.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

TABLE OF CONTENTS - Continued

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

L. D. JAMESON,

Petitioner,

vs.

BETHLEHEM STEEL CORPORATION PENSION PLAN OF BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES, also known as BETHLEHEM 1977 SALARIED PENSION PLAN, GENERAL PENSION BOARD, BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, L. D. Jameson, respectfully prays that a writ of certiorari

issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 26, 1986.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania, which is unreported at the time of the preparation of this petition, and the unpublished opinion of the Court of Appeals, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was rendered on September 26, 1986. The Court's jurisdiction is invoked under 28U.S.C., Section 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

Section 1053(a).

> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age....

Section 1053(b)(1).

> In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this section, all of the employees' years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:
>
> (F). Years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date.

STATEMENT OF THE CASE

The material facts are not in dispute.

The petitioner, L.D. Jameson, was a management employee in Venezuela of the Iron Mines Company of Venezuela ("IMCOV"),

a wholly owned subsidiary of Bethlehem Steel Corporation, from May, 1953 to February 28, 1970. On March 1, 1970, Jameson was transferred to Bethlehem's operation in Spain and continued in the employ of Bethlehem Steel until February 29, 1980.

By virtue of the law of Venezuela, Jameson was entitled to and received from Bethlehem a termination benefit in the nature of a severance allowance, designated as "Cesantia and Antiguedades," ("C & A"), when his assignment with IMCOV terminated in 1970. The National Labor Law of Venezuela provided the "C & A" is a vested right which cannot be waived under any circumstances.

At the time of Jameson's transfer to Bethlehem's operation in Spain in 1970, he was given an option, under a Bethlehem policy, of refunding the "C & A" and receiving pension credit for the years of service in Venezuela, or of retaining the payment and being classified as a new employee, with the consequent loss of credit, for pension purposes, for his years of service in Venezuela. Jameson

did not refund the "C & A." As a consequence, Bethlehem considered Jameson's transfer to Spain as a "break in service," and thereby classified him as a new employee as of that date.

Jameson resigned on February 29, 1980, and applied for a regular pension and other retirement benefits to which he was entitled for the years of service to Bethlehem. Because Jameson had not refunded the "C & A," the Pension Board, relying on the company policy in effect in 1970, refused to include the Venezuela years in computing his pension benefits. The Pension Board determined that Jameson was entitled only to a deferred pension based on ten years of service -- from March 1, 1970 to February 29, 1980.

Neither the pension plan in effect when Jameson was transferred from Venezuela to Spain in 1970, nor the plan document in force in 1980 when he resigned, contained a provision that refusal to refund "C & A" upon reassignment of employment would constitute a break in service.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE INTERPRETATION OF 29 U.S.C., SECTION 1053(a)(b)(1)(F).

ERISA provides in pertinent part that in computing the period of service under the plan for purposes of determining the nonforfeitable percentage of service under subsection (a)(2), 29 U.S.C., Section 1053(a)(2), all of an employee's years of service in covered employment shall be taken into account, except that the Administrator may disregard "years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date." Section 203(b)(1)(F), 29 U.S.C., 1053(b)(1)(F).

The legislative history found in the House Conference Report with respect to the ERISA provisions relating to vesting and participation states:

> Generally, the vesting rules of the conference substitute are to apply to all accrued benefits, including

> those which accrued before the effective date of the provisions (subject, however, to the break-in-service rules discussed below).
>
> H.R. Conf. Rep. No. 93-1280, 93rd Cong., end Sess. 275, reprinted in [1974] U.S. Code Cong. & Admin. News, 4639, 5038, 5056.

Venezuelan law required Bethlehem's subsidiary operation in Venezuela, IMCOV, which employed Jameson, to pay him certain benefits known as "Cesantia" and "Antiguedades," a sort of severance allowance, at the time of the termination of his employment in Venezuela in 1970. Upon Jameson's transfer to Spain the very next day, Bethlehem's policy then in effect required Jameson to repay the severance allowance, or lose the accrued benefits for the years he had worked in Venezuela.

In 1980 when Jameson applied for a pension, the Plan Administrator treated Jameson's refusal to repay the "C & A" monies when he was assigned to Bethlehem's operation in Spain in 1970 as a break in service, on the basis of company policy in effect at that time. As a result, the respondent refused to include Jameson's

accrued credits for 17 years of covered service in Venezuela, in the calculation of his pension benefits.

It is significant that the pension plan in effect in 1970 had no "break-in-service" rules and contained no provision to the effect that a refusal to repay "C & A" monies upon cessation of employment in Venezuela and transfer to another Bethlehem operation would be deemed to be a "break in continuous service." And neither was such a provision inserted in the pension plan which was amended on July 31, 1977, following the enactment of ERISA. However, after the effective date of ERISA, the plan did provide for break-in-service rules. Section 5.1 defines "break in continuous service" and sets forth the consequences of such a break for pension purposes.

The "break-in-service" rules enacted in 1977 by amendment are substantially similar to those listed in Internal Revenue Regulation 1.410(a)-7. These rules apply to pre-1976 service as well as subsequently thereto. I.R. Regulation 1.410(a)-7

lists only the following causes for breaks in service: "quit; discharge; retirement and absence in excess of one year." Section 5.1 of the present Plan meets these minimum requirements of the Regulation. The Regulation also requires: "...a Plan to take into account the period of time which elapses while the employee is employed (i.e., while the employment relationship exists) with the employer or employers maintaining the Plan...." Jameson's continuous service commenced on the date of his initial employment date, May 5, 1953, and ended without interruption with his retirement on February 29, 1980.

The threshold question is whether the Plan Administrator may disregard the petitioner's years of employment in Venezuela by reason of a company policy outside of the pension plan in effect in 1970 when petitioner was terminated in Venezuela and immediately transferred to another company operation. The language of subsection (b)(1)(F) of 29 U.S.C., 1053, with respect to the break-in-service rule of the plan in effect on the applicable date, is

ambiguous. However, the issue is purely academic in the instant case, because neither the Plan in effect when the petitioner was terminated in Venezuela in 1970, nor the 1977 Plan which was effective at the time of the ruling on petitioner's application for a full pension, contained the company policy as a break-in-service rule.

The lower court determined that subsection (b)(1)(F) directed it to the 1968 Plan "as the plan in effect at the applicable date" and recognized that it must decide "whether that policy is, nevertheless, part of the 'plan in effect' in 1970." Conceding that the policy was outside of the plan in effect in 1970, the court found, however, that the subject policy was in itself a "pension plan" as defined by the Act, 29 U.S.C., Section 1002(3), (2)(A). As a consequence, the Court of Appeals concluded that the policy in effect in 1970 was a plan under ERISA, and, therefore, that the event of petitioner's transfer in 1970 was properly treated by the respondent as a break in service

according to said policy. In this manner, the court sought to conform its ruling with section (b)(1)(F) requiring the break-in-service rule to be a part of the plan on the applicable date.

The Third Circuit's interpretation of the policy as a duly qualified pension plan under ERISA is egregiously erroneous. There is nothing in the record to show that the IRS was aware of the Bethlehem policy, and that it had approved it as a qualified pension plan. The legislative history of ERISA and the Congressional policy which led to the enactment of the act readily demonstrate that Congress intended to recognize only break-in-service rules which had been written in the pre-ERISA plans, and to disregard any unwritten policies or practices which were unknown to the IRS and contrary to IRS rules.

The vesting rules of ERISA were intended to apply to all accrued benefits, subject, however, to the break-in-service rules in effect on the applicable date. Petitioner insists that the 17 years of

covered employment in Venezuela must be taken into account in computing the non-forfeitable percentage of service under ERISA, unless petitioner had incurred a break in service under the rules of the plan in effect on the applicable date, section 1053(b)(1)(F). There is no provision in the 1977 Plan, in effect at retirement, which provided that a break in service shall occur if the employee refuses to repay the "C & A" benefit (severance allowance) received by him at the time of his termination in Venezuela. Neither does the 1977 Plan explicitly provide that pension eligibility shall be determined in accordance with the policy in effect at the time of the termination of employment in Venezuela and transfer to another company operation. Because of the silence in the 1977 Plan on the 1970 break-in-service policy, and the absence of the policy as a break-in-service rule in the 1968 Plan, the respondent was precluded from denying pension credits to the petitioner for his covered service in Venezuela on the basis of said policy.

There is a dearth of cases specifically applying section 1053(b)(1)(F). There are nonetheless several decisions which have interpreted the said ERISA provision, but none of them is supportive of -- rather, all are in conflict with -- the decision of the Court of Appeals in this case. One of the cases is from the Third Circuit, albeit a different panel, Tanzillo v. Local Union 617, Int'l. Bd. of Teamsters, 769 F.2d 140 (1985). Tanzillo recognized that the plan in effect at the time an employee files his claim is controlling if that plan document makes no reference to a break-in-service rule of a pre-ERISA plan in effect at the applicable time. In Tanzillo, however, the court found that the plan in effect at the time the pensioner filed his claim required the application of the break-in-service provisions of an earlier plan which was in force at the time of the alleged hiatus from covered employment.

The other decisions which have considered and interpreted section 1053(b)(1)(F) are discussed in Tanzillo. They are

district court cases, Govoni v. Bricklayers Pension Fund, 573 F.Supp. 82 (Mass - 1983); Snyder v. Titus, 513 F.Supp. 916, (E.D.Va.-1981). These cases stand for the proposition that the break-in-service provision in effect at the time the retiree files his claim is controlling, absent a reference in that plan to a different rule for pre-ERISA breaks in service.

In the present case, the earlier plan of 1968 which was in effect in 1970 when the company policy required petitioner to repay his "C & A" benefit or forfeit the credits for the covered employment in Venezuela, did not contain the break-in-service policy or any other break-in-service rule. As a matter of fact, the petitioner had been employed continuously, without any break whatsoever, from the time of his initial employment in 1953 until his retirement in 1980. The break-in-service policy was a mere pretext to recover the "C & A" benefit which the company was mandated by Venezuelan law to pay its employee upon termination of employment in that country. This pretext

is readily evident from the fact that the subject policy was not incorporated in the pension plan prior or subsequent to ERISA. A provision relating to the 1970 policy could have been incorporated easily if that had been the true intention of the drafters of the plan. In absence of any indication of intent on the part of the drafters of the plan, the rational interpretation is that the failure expressly to mention such policy as a break in service in the 1977 Plan, and its predecessor, was intentional. To consider the 1970 policy as a separate plan is simply untenable.

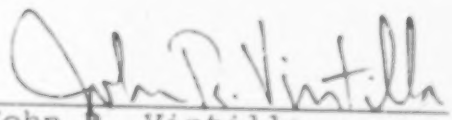
Where the 1977 Plan which was effective at the time of the ruling on the petitioner's claim for pension benefits did not specifically refer the respondent to the 1970 policy regarding the alleged break in service, the respondent's application of the 1970 policy as a break-in-service rule to the petitioner was arbitrary and capricious. Even if some interpretation of the 1977 Plan were required with respect to the 1970 break-in-service

policy, a rule for that period could be no stricter than the definition of a break in service found in Section 5.1 of the 1977 Plan. Thus, the correctness of the decision below is open to serious question.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,



John R. Vintilla
150 Plaza West Building
20220 Center Ridge Road
Cleveland, Ohio, 44116
Tel. (216) 333-9955

Counsel for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

L.D. JAMESON	:	CIVIL ACTION
v.	:	
BETHLEHEM STEEL CORPORATION, et al.	:	NO. 83-6006

MEMORANDUM OPINION AND ORDER

HUYETT, J. APRIL 7, 1986

Plaintiff Jameson brought this action pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Section 1001, against his former employer, Bethlehem Steel Corporation, the Pension Plan of Bethlehem Steel Corporation, the Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies ("Pension Plan"), and the General Pension Board which administers the pension plan. He alleges that defendants violated provisions of ERISA by refusing to credit him with service earned while he was employed by Irons Mines Company of Venezuela ("IMCOV"). a subsidiary of Bethlehem Steel Corporation. Presently pending before me are cross-motions for

summary judgment. For the reasons outlined below, I will grant defendants' motion and deny plaintiff's.

The material facts in this case are undisputed. Plaintiff worked for IMCOV from May 5, 1953 to February 28, 1970. When his assignment with IMCOV terminated in 1970, defendant Bethlehem Steel paid him $56,492 in "Cesantia and/or Antiguedades" (C&A"), a form of severance or separation pay provided for under Venezuelan law. On March 1, 1970, plaintiff commenced working for Bethlehem Mines, a subsidiary in Spain.

In 1970, it was defendant Bethlehem's policy that any person who worked in Venezuela and who upon completion of his or her assignment in Venezuela was given the "C&A" payment had to elect either to return the C&A or lose credit, for pension purposes, for their years of service with IMCOV. This policy was reflected in a memorandum dated January 27, 1967 from the Secretary of the General Pension Board to the Vice President of Bethlehem; the memorandum clearly states that an employee who

accepts and does not repay the C&A to the company at the time he is rehired at another Bethlehem operation begins at such other operation as a new employee. This policy existed before 1967, and plaintiff was advised of it in a memorandum dated September 6, 1966. See Defendant's Memorandum, Exhibit 2.

Plaintiff acknowledges that he was aware of Bethlehem's policy with respect to the C&A payments. In February of 1979, plaintiff made arrangements for his resignation from Bethlehem. The final terms of his resignation were encompassed in a written agreement dated March 23, 1979 which in turn incorporated a memorandum dated February 15, 1979. See defendant's memorandum, exhibit 4 and attachment A. The February 15, 1979 memorandum specifically stated that as of his formal resignation and termination on February 29, 1980, plaintiff would have accumulated ten years' continuous service with Bethlehem. Plaintiff signed the March 23, 1979 memorandum, stating his agreement with its terms. Moreover, Bethlehem agreed to

continue plaintiff at half his regular salary from March 1, 1979 to February 29, 1980 to give plaintiff ten years credit and therefore make him eligible for a deferred vested pension.

When plaintiff resigned in 1980, the General Pension Board determined that plaintiff was entitled to a deferred pension, based on ten years of service -- from March 1, 1970 to February 29, 1980. Plaintiff claimed that he should also receive credit for the seventeen years he spent in Venezuela, but the General Pension Board, relying on the company policy in effect in 1970, denied credit for that period. Because plaintiff did not refund the C&A, the Pension Board refused to include the Venezuela years in computing his pension benefits. Plaintiff now alleges that the Pension Board's refusal to include the Venezuelan years in its calculation was in violation of ERISA's provision barring forfeitures after ten years of service. 29 U.S.C., Section 1053(a)(2)(1).

Previously, I granted defendant's

motion for summary judgment on the issue of jurisdiction under ERISA. The Third Circuit reversed and remanded the case for me for further proceedings. See Jameson v. Bethlehem Steel Corporation, 765 F.2d 49 (3d Cir. 1985). The Third Circuit concluded that plaintiff's cause of action arose in 1980 and therefore came within the scope of ERISA's jurisdictional provision. 29 U.S.C., Section 1144(b). The court suggested, however, that state law may govern: "[o]nce jurisdiction has attached, the 'act or omission' provision of Section 514, does no more than inform the court that ERISA's substantive provisions are not to be used to determine the law at the time of incidents occurring before January 1, 1975." 765 F.2d at 52.

What law governs the issues raised by the cross-motions for summary judgment is the first question for me to resolve. Defendants contend that the Third Circuit decision dictates that state law governs the merits of this suit. Plaintiff, on the other hand, contends that his claim is based entirely on ERISA; he claims that

defendants' refusal to credit the plaintiff with the years of service in Venezuela in computing his pension benefits constitutes a violation of the pension plan which is controlling in this case and a violation of section 203(a) of ERISA which prohibits the forfeiture of an employee's rights to his pension once they have vested. Plaintiff also argues that section 402(a)(1) of ERISA, 29 U.S.C., section 1102(a)(1), which provides that every employee benefit plan should be established and maintained pursuant to a written instrument, requires that defendants credit his years in Venezuela.

I agree with plaintiff that he has stated a claim arising under ERISA. Therefore, ERISA must be applied to determine whether plaintiff's pension rights were nonforfeitable[1]. However, to the extent of acts or policies in effect prior to

---

1. Defendants raise a number of defenses under state law such as equitable estoppel and laches. Because I conclude that ERISA governs plaintiff's claim, I will not address these defenses.

1975, the effective date of ERISA, are determinative of the outcome here, ERISA will not govern. I cannot apply the rules and restrictions of ERISA to acts or policies predating ERISA's effective date.

The starting point is to examine which of ERISA's substantive provisions govern plaintiff's claim -- a claim based on an employment history prior to January 1, 1975 but filed after that date. Section 203 of ERISA, 29 U.S.C. Section 1053 govern the vesting of pensions, and plaintiff relies on subsection (a)(2)(A) in claiming that his pension rights were nonforfeitable[2]. Subsection (b)(1)(F) provides, however, that certain periods of time may

---

2. Section 203(a)(2)(A) of ERISA provides:

> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements (1) and (2) of this subsection.
>
> (2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A),(B), or (C).
>
> (A) A plan satisfies the requirements

not be included in calculating the nonforfeitable percentage under subsection (a)(2):

> (1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this section, all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:
>
> (F) years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with respect to breaks in service, as in effect on the applicable date;

As the Third Circuit, in Tanzillo v. Local Union 617, 769 F.2d 140,145 (3d Cir. 1985), recently noted:

> ERISA thus explicitly recognizes break-in-service forfeiture of those credits which had been accrued prior to the effective date of ERISA, if such break-in-service forfeiture is provided for in the applicable plan document.

---

2. Continued.

> of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit from employer contributions.

Therefore, if plaintiff had a break in service under the applicable pension plan, his claims fail.

In Tanzillo, the court concluded that under the plan in effect at the time Tanzillo filed his claim, i.e. the 1978 plan, pension eligibility was to be determined under the terms of the plan in effect at the time of the alleged break in service. Application of the earlier plan, the court concluded, was consistent with section 203(b)(1)(F) of ERISA which expressly provides for the forfeiture of accrued credits for a break in service "under the rules of the plan with regard to breaks in service, as in effect on the applicable date." The court then determined that under the 1962 pension plan, Tanzillo had a break in service which caused him to forfeit previously accrued pension credits.

Applying a similar analysis in this case, I look first to the plan in effect at the time plaintiff filed his pension claim in 1980, the 1977 Plan. The 1977 Plan provides benefits for all eligible employees based on their "continuous

service." Section 5.1 of the Plan provides in pertinent part:

> The term "continuous service" as used in this Plan means continuous service in the employ of one or more of the Employing Companies, except as in this Section 5 otherwise provided, prior to retirement calculated from the Employee's last hiring date (this means in the case of a break in continuous service, continuous service shall be calculated from the date of reemployment following the last unremoved break in continuous service) in accordance with the following provisions; provided, however, that the last hiring date prior to the effective date of this Plan shall be based on the practices in effect at the time the break occurred.

Therefore, continuous service for purposes of the 1977 Pension Plan is measured from the employee's last hiring date to the date of his retirement. Breaks in service after the effective date of the Plan occur when an employee quits, is discharged, is terminated because of a plant shutdown, or is absent for more than two years. However, the proviso in section 5.1 states that the last hiring date prior to the effective date of the Plan shall be based on the

practices in effect at the time the break occurred.

Defendants contend that based on the practices then in effect, plaintiff's last hiring date was March 1, 1970 when he started work for the Bethlehem subsidiary in Spain. Plaintiff was considered a new employee in 1970 because he had elected to receive and keep the C&A payment. It was an established policy, reflected in the January 17, 1967 memorandum by G.W. Vary, that if a person who received and retained a severance allowance like the C&A, were rehired by Bethlehem or one of its subsidiaries, he or she would be considered a "new employee" and would not receive credit for any previous employment. It appears, therefore, that plaintiff had a break in service in 1970 which is fatal to his claim for pension credit for the period 1953-1970.

Plaintiff, however, contends that the policy regarding the C&A payments and forfeiture of pension credit had to be included in writing in the Pension Plan in order to be valid. In support of this contention,

plaintiff relies on the language in Tanzillo to the effect that ERISA recognizes pre-ERISA breaks in service, "if such break-in-service forfeiture is provided for in the applicable plan document." 769 F.2d at 145. Plaintiff also apparently relies on section 402 of ERISA, 29 U.S.C. Section 1102, which states that every employee benefit plan shall be established and maintained pursuant to a written instrument. Plaintiff contends that the policy with respect to C&A payments should have been set forth in writing, if not in the 1968 plan, then definitely in the 1977 plan, and that the 1967 memorandum is insufficient.

I find that plaintiff's contentions fail. First, plaintiff's reading of Tanzillo is unduly restrictive. Admittedly, no plan sets forth the policy regarding C&A payments which was in effect in 1970, five years before ERISA went into effect. However, the 1977 Plan specifically states that the last hiring date before the effective date of the Plan will be determined by the policies in effect at the time of

the break. In this instance, one refers to policies which defendants had established and put into effect before the effective date of ERISA. I do not think Tanzillo requires pre-ERISA policies to be embodied in a written plan[3].

---

3. I have reviewed plaintiff's counsel's letter dated March 28, 1986 which I have docketed. Counsel argues that under Tanzillo, the applicable plan is the 1968 Salaried Pension Plan. As I have noted, however, under Tanzillo, a reviewing court looks first to the plan in effect at the time the plaintiff filed his pension claim, which, in this case is the 1977 plan. In Tanzillo, the 1978 plan referred the court to the earlier plan; in this case, the 1977 plan refers me to the policies in effect at the time of the "break." Although I would agree with plaintiff that the policy would have to be incorporated into the pension plan after the effective date of ERISA, I do not believe I can impose such a rule on a policy which was in writing and which was applied consistently and with plaintiff's full knowledge before the effective date of ERISA. Plaintiff was a new employee as of March 1, 1970.

Moreover, looking to the 1968 plan, section 5.1 of the Plan states in pertinent part:

> The number of years of continuous service of any participant shall be conclusively determined for all purposes of this Plan by the General Pension Board.

The General Pension Board clearly established its policy with respect to the C&A payments as early as 1967 as reflected in the January 27, 1967

Similarly, section 402 of ERISA, requiring all terms and policies governing pension plans to be in writing, cannot be applied to plans before the effective date of ERISA. To hold otherwise would be to apply ERISA retroactively which is exactly what the Third Circuit in this case said could not be done. The "'act or omission' provisions is a direction as to choice of law and is intended to ensure that ERISA is not applied retroactively." 765 F.3d at 51. Therefore, I conclude that consistent with section 203(b)(1)(F) of ERISA, plaintiff had a break in service in 1970 when he accepted and retained the C&A payment and that he forfeited the seventeen years of pension credit which he had accrued between 1953 and 1970.

---

3. Continued.

memorandum from the Secretary of the General Pension Board, G.C. Vary to the Vice President of Bethlehem. There would be a break in service if the employee receiving the C&A payment elected not to return it. Therefore, the General Pension Board's handling of plaintiff's claim is consistent with the 1968 plan and the Board's policies.

If the events in this case had all occurred after the effective date of ERISA, i.e., plaintiff has worked in Venezuela until 1977, accepted and retained the C&A in 1977, and then worked for ten years before filing a claim for a pension, the outcome of this case might be different. First, the provision requiring written plans would govern and the policy governing C&A payments would have to be set forth in writing. More importantly, section 203(b)(1)(F) of ERISA would not govern because the "break" in service would have occured after the effective date of ERISA.

In reviewing the Pension Board's determination to deny plaintiff benefits under the terms of the plan, I must defer to the Board's determination so long as its interpretation of the plan is neither arbitrary nor capricious. Tanzillo, 769 F.2d at 147. Because I conclude that the 1977 plan requires the policies in effect at the time of the break be applied and because the policy pertaining to C&A payments was clearly established and was

aware of the policy, the Board's interpretation of the Plan and the break-in-service rule is neither arbitrary nor capricious.

An appropriate order follows.

/s/
Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

L.D. JAMESON	:	CIVIL ACTION
v.	:	
	:	NO. 83-6006
BETHLEHEM STEEL CORPORATION, et al.	:	

ORDER

NOW, April 7, 1986, upon consideration of the cross-motions for summary judgment, the memoranda of law submitted by the parties, the arguments made orally by the parties, and for the reasons stated in the accompanying memorandum opinion, IT IS ORDERED that defendants' motion for summary judgment is GRANTED and plaintiff's motion for summary judgment is DENIED.

Judgment is entered in favor of defendants and against plaintiff.

/s/
Daniel H. Huyett, 3rd, Judge

(Entered: 4/9/86; Clerk of Court)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

L.D. JAMESON	:	CIVIL ACTION
v.	:	
	:	NO. 83-6006
BETHLEHEM STEEL CORPORATION, et al.	:	

CIVIL JUDGMENT

Before HUYETT, J.

AND NOW, this 8th day of April, 1986, in accordance with the order dated April 7, 1986,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the defendants and against the plaintiff.

BY THE COURT:

(Entered: 4/9/86)

ATTEST: Francis E. DeVine
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1242

JAMESON, L.D.

Appellant

v.

BETHLEHEM STEEL CORPORATION
PENSION PLAN OF BETHLEHEM STEEL CORPORATION
AND SUBSIDIARY COMPANIES, also known as
BETHLEHEM 1977 SALARIED PENSION PLAN
GENERAL PENSION BOARD, BETHLEHEM STEEL
CORPORATION AND SUBSIDIARY COMPANIES

On Appeal from the United States District
Court for the Eastern District
of Pennsylvania
District Judge: Hon. Daniel H. Huyett, 3rd

Submitted Under Third Circuit Rule 12(6)
September 11, 1986

Before: ALDISERT, Chief Judge, HIGGINBOTHAM,
and HUNTER, Circuit Judges

Opinion filed September 26, 1986

MEMORANDUM OPINION

HUNTER, Circuit Judge:

1. L.D. Jameson worked for Iron Mines Company of Venezuela, a subsidiary of Bethlehem Steel Corporation ("Bethlehem") from May 5, 1953 to February 28, 1970. On March 1, 1970, Jameson was transferred to a Bethlehem subsidiary in Spain where he worked until 1980. Bethlehem, as required by Venezuela law, paid Jameson $56,492 in severance pay (known as "Cesantia and Antiguedades") when he finished his work in Venezuela.

2. Consistent with Bethlehem policy at that time, Bethlehem offered Jameson the option of either returning the severance pay and receiving pension credit for those seventeen years, or of keeping the severance pay and being treated as a new employee for pension purposes. Jameson chose to keep the severance pay. This policy of giving the employee an option regarding severance pay was not part of a distributed and printed pension plan. However, it was embodied in various memoranda and Jameson knew about the policy.

3. Jameson resigned and applied for pension benefits in 1980. Bethlehem considered him eligible for benefits as an employee with 10 years of service. Jameson complained to the Bethlehem Pension Board requesting that his years in Venezuela be credited to his pension. The Pension Board refused to credit those years because it considered him a new employee as of 1970 due to his failure to return the severance pay.

4. Jameson brought suit in the United States District Court for the Eastern District of Pennsylvania under section 203(b)(F) of the Employee Retirement Security Act ("ERISA"), 29 U.S.C. Section 1053(b)(F) (1982). That court initially granted Bethlehem's motion for summary judgment on jurisdictional grounds. This court reversed and remanded. See Jameson v. Bethlehem Steel Corp. Pension Plan of Bethlehem Steel and Subsidiary Cos., 765 F.2d 49 (3d Cir. 1985).

5. On remand, Jameson argued that an employer cannot disregard an employee's pre-ERISA years of service unless it does

so pursuant to a written pension plan. Since Bethlehem's policy of treating Venezuelan workers as new employees unless they returned their severance pay was not part of Bethlehem's written pension plan, Jameson argued that ERISA precluded Bethlehem from not crediting him for those years.

6. The district court considered motions for summary judgment by both parties. It held that ERISA does allow an employer to rely on a pre-ERISA policy which was not part of a written pension plan but which defined a break in service to disregard years of service for pension purposes. Therefore, the court awarded Bethlehem summary judgment.

7. In reviewing a district court's award of summary judgment, an appellate court must apply the same test that the district court should have applied. See Koshatka v. Philadelphia Newspapers, Inc., 762 F.2d 329, 333 (3d Cir. 1985). The district court held for Bethlehem because it found that the Pension Board did not act arbitrarily or capriciously when it relied on

the severance policy to deny Jameson's claim for pension credit. See Tanzillo v. Local Union 617, Int'l Brd. of Teamsters, 769 F.2d 140, 147 (3d Cir. 1985) (standard of review of a pension board is arbitrary or capricious). We agree. However, we reach this result by looking to a different pension plan than that considered by the district court.

8. ERISA requires that all of an employee's years of service with an employer be credited in computing his pension eligibility, subject to a few limited exceptions. See ERISA Section 203(b), 29 U.S.C. Section 1053(b) (1982). An employer may disregard those years of service before ERISA's effective date of January 1, 1976 if those years could have been disregarded under "the rules of the plan with regard to breaks in service, as in effect on the applicable date." ERISA Section 203(b)(F), 29 U.S.C. Section 1053 (b)(F) (1982). "Plan" with respect to pension plans, refers to "any plan, fund or program" established to provide retirement income. See ERISA Section 3(3), (2)(A), 29 U.S.C. Section 1002(3), 2(A) (1982).

"Applicable date" is not defined by the statute.

9. At the time of Jameson's alleged break in service in 1970, a 1968 pension plan was in effect at Bethlehem. A 1977 plan was in effect in 1980 when Jameson retired and applied for benefits. The 1968 plan provided that pension benefits would accrue during "continuous service," but did not define continuous service or a break in service. The 1977 plan also provided that pension benefits would accrue during continuous service with such service to be measured from the last hiring date. With respect to an alleged break in service occurring after the 1977 plan went into effect, the plan listed which employee actions constituted a break in service. If a break in service occurred, an employee's last hiring date would be determined to occur after that break. The 1977 plan provided that the last hiring date of a person who experienced an alleged break in service before the 1977 plan went into effect should be

determined by "the practices in effect at the time the break occurred."[1]

10. Jameson contends that the provision on "practices in effect at the time the break occurred" comes into effect only after it is determined that an employee experienced a break in service as defined in the 1977 plan. This is incorrect, since the 1977 plan explicitly states that pre-1977 practices should be used to determine a pre-1977 last hiring date.

11. The case law is unclear regarding which pension plan should apply to

---

1. The 1977 plan stated:

SECTION 5. DETERMINATION OF CONTINUOUS SERVICE

The term "continuous service" as used in this Plan means continuous service in the employ of one or more of the Employing Companies, except as in this Section 5 otherwise provided, prior to retirement calculated from the Employee's last hiring date (this means in the case of a break in continuous service, continuous service shall be calculated from the date of reemployment following the last unremoved break in continuous service) in accordance with the following provisions; provided, however, that the last hiring date prior to the effective date of this Plan shall be based on the practices in effect at the time the break occurred.

Jameson's claim. The district court determined that Tanzillo requires a court to look to the plan in effect at the time of retirement. In Tanzillo, the court relied on two district court cases which had held that, in general, the plan in effect at retirement should control a pension claim. See Tanzillo, 769 F.2d at 146 (referred to Govoni v. Bricklayers Int'l Union of America, Local No. 5 Pension Fund, 573 F. Supp. 82 (D. Mass. 1983), aff'd, 732 F.2d 250 (1st Cir. 1984); Snyder v. Titus, 513 F.Supp. 926 (E.D. Va. 1981). The court in Govoni reasoned that, since many revised plans include rules with a retroactive effect, it would frustrate the intent of the parties to ignore the new plan. See Govoni, 573 F.Supp. at 85. The court in Snyder reasoned that it is logical to use the plan in effect at retirement absent a showing that that would be arbitrary or capricious. See Snyder, 513 F.Supp. at 931-32. Neither of these arguments convinces us that the plan in effect at the date of retirement should apply in this case.

12. Tanzillo does not require us to use the plan in effect at the time of retirement. The court in Tanzillo was not particularly concerned with the issue because the plan in effect at retirement referred back to the earlier plan when considering events prior to the effective date of the later plan. We need not be overly concerned with the issue since the 1977 plan refers to prior practices for prior events, making the 1968 plan controlling whether we begin our analysis with the 1968 plan or the 1977 plan. We note, however, that we believe our analysis should begin with the 1968 plan. The 1977 plan is not retroactive, nor does either party argue that it should be.

13. Our analysis, therefore, begins with ERISA SEction 203(b)(F), 29 U.S.C. Section 1053(b)(F), which we believe directs us to the 1968 plan as "the plan in effect at the applicable date." Since Bethlehem's severance pay policy was not past of the 1968 written pension plan, the issue we must decide is whether that

policy is, nevertheless, part of the "plan in effect" in 1970.

14. As Bethlehem points out, ERISA cannot be used to determine pre-ERISA law. See Jameson, 765 F.2d at 52. However, since ERISA specifically directs us to a "plan," we must look to post-ERISA law for the limited purpose of determining what constitutes a "plan." Pre-ERISA definitions of the word "plan" would not be relevant here because ERISA initiated the technical use of the word.

15. The words of ERISA seem to allow a separate severance policy to be included within the meaning of a pension plan. A pension plan is defined under ERISA as "any plan, fund, or program" established to provide retirement income. See ERISA Section 3(3), (2)(A), 29 U.S.C, Sections 1002(3), (2)(A) (1982). Bethlehem's severance policy acted to give an employee a choice of being paid his severance at transfer or at retirement, and seems to be a "program" providing retirement income within the statute.

16. Severance policies have been interpreted to be "plans" in another context. Such policies are plans for the purposes of whether they must comply with ERISA requirements. See Jung v. FMC Corp., 755 F.2d 708, 710 (9th Cir. 1985); Sly v. P.R. Mallory and Co., 712 F.2d 1209, 1213 (7th Cir. 1983) (severance policy separate from written pension plan is part of "plan" for purposes of ERISA). In the context of those cases, such an interpretation serves to further protect the employee's pension rights. While such an interpretation in the context of the present case serves to deny Jameson his claim, it will not deprive him of the severance he was already paid and cannot, therefore, be said to violate ERISA. See Pension Benefit Guaranty Corp. v. R. A. Gray and Co., 104 S. Ct. 2709 (1983) (purpose of ERISA is to protect employees' promised benefits).[2]

---

2. Interestingly, if we were to analyze Jameson's claim as the district court did, by going through the 1977 plan to the 1968 plan rather than directly, it would be even harder for Jameson to prove his case. Since the 1977 plan directs the reader to the "practices in effect" at the prior date, the

17. We conclude that the severance policy was a plan for the purposes of ERISA and that Bethlehem correctly used it to treat the 1970 transfer as a break in service. We will affirm the district court award of summary judgment to Bethlehem.[3]

TO THE CLERK:

Please file the foregoing opinion.

JAMES HUNTER, III, Circuit Judge

---

2. Continued.

severance policy would be unambiguously included in the analysis.

3. Because we have affirmed in favor of Bethlehem, we need not reach Bethlehem's common-law defenses.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1242

JAMESON, L.D.

Appellant

v.

BETHLEHEM STEEL CORPORATION
PENSION PLAN OF BETHLEHEM STEEL CORPORATION
AND SUBSIDIARY COMPANIES, also known as
BETHLEHEM 1977 SALARIED PENSION PLAN
GENERAL PENSION BOARD, BETHLEHEM STEEL
CORPORATION AND SUBSIDIARY COMPANIES

On Appeal from the United States District
Court for the Eastern District
of Pennsylvania
D.C. Civil No. 83-6006
District Judge: Hon. Daniel H. Huyett, 3rd

Before: ALDISERT, Chief Judge, HIGGINBOTHAM,
and HUNTER, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District

Court for the Eastern District of Pennsylvania and was submitted September 11, 1986.

On consideration whereof, it is now ordered and adjudged by this Court that the order of the District Court entered April 7, 1986 be, and the same is hereby, affirmed.

Costs taxed against appellant.

ATTEST:

/S/ Sally Mrvos
Clerk

September 26, 1986

86-988

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

L.D. JAMESON,

Petitioner,

v.

BETHLEHEM STEEL CORPORATION
THE PENSION PLAN OF BETHLEHEM
STEEL CORPORATION AND
SUBSIDIARY COMPANIES, ALSO
KNOWN AS BETHLEHEM 1977
SALARY PENSION PLAN AND THE
GENERAL PENSION BOARD,
BETHLEHEM STEEL CORPORATION
AND SUBSIDIARY COMPANIES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO BRIEF OF RESPONDENTS IN OPPOSITION

DONA S. KAHN, ESQUIRE
ALISON PEASE, ESQUIRE
Attorneys for Respondents

Of Counsel:
HARRIS AND KAHN
14th Floor
1600 Market Street
Philadelphia, PA 19103
(215) 568-4202

Kathleen M. Mills, Esquire
Bethlehem Steel Corporation
Martin Tower — Room 2086
Bethlehem, PA 18016
(215) 694-6750

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

L. D. JAMESON, *Plaintiff,*	)	
vs.	)	
BETHLEHEM STEEL CORPORATION, THE PENSION PLAN OF BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES, also known as BETHLEHEM 1977 SALARIED PENSION PLAN, and the GENERAL PENSION BOARD, BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES, *Defendants.*	)	Case No. 83-6006

AFFIDAVIT OF DAVID W. KEMPKEN

I, DAVID W. KEMPKEN, being duly sworn, depose and say as follows:

1. I am of legal age and sound mind, and I am competent to make this Affidavit.

2. I am the Secretary of the General Pension Board of the Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies ("Pension Plan"). I am also the Plan Administrator.

3. I have reviewed the allegations in Plaintiff's Complaint in this action which was served on December 20, 1983; and I have examined the pertinent records pertaining to the participation of L. D. Jameson in the Pension Plan arising out of his previous employment by Bethlehem Steel Corporation and its subsidiary companies.

4. Any rights that L. D. Jameson may have to pension benefits based on his previous employment by Bethlehem Steel Corporation and its subsidiary companies are determined by the provisions of the

Pension Plan. A true and correct copy of the Pension Plan is attached as Exhibit A and incorporated in this Affidavit.

5. According to the pertinent records, L. D. Jameson was employed by the Iron Mines Company of Venezuela, a wholly-owned subsidiary of Bethlehem Steel Corporation, from May 5, 1953 until February 28, 1970. On the termination of his employment in Venezuela, he was paid "Cesantia" and "Antiquedades" in the total sum of $56,492 which resulted in a break in his continuous service under the Plan. He had the option of repaying the "Cesantia" and "Antiquedades" when he was reemployed by Bethlehem Mines Corporation in Spain and having the break removed and his previous service in Venezuela restored for the purpose of pension benefits. However, he elected to retain the "Cesantia" and "Antiquedades" and to begin as a new employee with Bethlehem Mines Corporation. He was employed by Bethlehem Mines Corporation in Spain from March 1, 1970 to May 31, 1975. He was employed by Bethlehem Steel Corporation from June 1, 1975 until February 29, 1980. During much of that period he was employed in Sierra Leone, but he returned to the United States in 1979. He was nominally employed at 50 percent of his regular salary from March 1, 1979 through February 29, 1980. He resigned as of February 29, 1980.

6. L. D. Jameson has qualified for a deferred vested pension under the Pension Plan, based on his service with Bethlehem Mines Corporation and with Bethlehem Steel Corporation from March 1, 1970 until February 29, 1980. He has the option of electing pension benefits at age 65 or of electing a reduced pension benefit at any time after reaching age 60.

7. In my position as Secretary and Plan Administrator, I made the determination that L. D. Jameson was not entitled to credit for the purpose of the Pension Plan for the length of his employment with the Iron Mines Company of Venezuela. The General Pension Board reviewed and upheld my determination.

DAVID W. KEMPKEN

Sworn to and subscribed before me this 20th day of January, 1984.

NOTARY PUBLIC

My Commission Expires April 30, 1987
City of Bethlehem
Lehigh County

INTER-OFFICE CORRESPONDENCE
BETHLEHEM STEEL

January 27, 1967

From G. C. Vary, Secretary, General Pension Board
To E. P. Leach, Vice President
Subject Home Office Roll Salaried Employees Working at Foreign Locations
Treatment of Separation Benefits Under Bethlehem Pension Plan

This will clarify the application of certain of the points covered in the February 16, 1959, letter from the Secretary of the General Pension Board on the above-captioned subject.

The contents of the February 16, 1959, letter were directed to employees working in foreign countries who are paid from the Home Office Roll and who had never received cesantia and antiquedad on account of employment with Bethlehem but who world retire in the future and would, upon such retirement, be simultaneously eligible for (1) cesantia and antiquedad and (2) a Bethlehem pension.

It was not the intent to give any options as to the time of repayment of cesantia and antiquedad to employees who are transferred from Iron Mines Company of Venezuela to a stateside position at any time during their active employment. To restate what our policy in such cases is:

> In the case of any "terminated" Iron Mines Company of Venezuela employee who is immediately rehired at another Bethlehem operation, the payment of cesantia and antiquedad represented a "pay-off" for the years of service during which such payment was built up and unless he repays that amount under an arrangement acceptable to the company *at the time* he is rehired at another Bethlehem operation, he begins at such other operation as a new employee.

This policy parallels the handling of severance allowance payments to employees who are terminated from one Bethlehem operation in the states and are subsequently rehired at that or another state-side Bethlehem operation.

If you have any question concerning the clarification contained above of the February 16, 1959, letter, I will be pleased to discuss the matter further with you.

G. C.
Secretary, General Pension Board

BETHLEHEM 1977 SALARIED PENSION PLAN

Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies adopted January 25, 1923, as amended July 31, 1977, and further amended July 1, 1979, as to paragraph 3.12, applicable to eligible salaried employees entitled for such month based on the law in effect at the time the surviving spouse's benefit first becomes payable (without regard to any offset or suspension imposed by such law). If the surviving spouse is not eligible for such a widow's or widower's benefit for such month, the amount of the reduction shall be equal to 50% of the amount of the widow's or widower's benefit that could have become payable to the surviving spouse for such month, based on the participant's wages, if the surviving spouse had been eligible and had applied for such a benefit.

(e) If the surviving spouse receives, or upon application would be entitled to receive, any payment derived from rights acquired by the participant, which would if received by the participant have been subject to deduction under paragraph 3.8 from any regular pension otherwise payable to the participant (except

any such payment received by the surviving spouse by reason of an election by the participant to receive a reduced payment), the amount of such payment not attributable to the contributions of the participant shall be deducted from the surviving spouse's benefit otherwise determined under this paragraph 4.3.

(f) Notwithstanding anything to the contrary in this paragraph 4.3, the amount determined in accordance with paragraph 3.3(b)(3) will be subject to the reductions provided for in paragraph 3.7(b) beginning with the month in which the participant would have attained age 65.

COMMENCEMENT AND TERMINATION OF BENEFIT

The first installment of any surviving spouse's benefit shall be payable for the month following the month in which the participant shall die, and the last installment shall be payable for the month in which the surviving spouse shall die; provided, however, that a surviving spouse's benefit shall not be payable for any month for which a special payment was payable to the participant. In connection with an application for a surviving spouse's benefit, the Plan Administrator may require the surviving spouse to grant any authorization necessary to receive relevant records from the agency administering the law referred to in paragraph 4.3(d).

DETERMINATION OF STATUS AS SURVIVING SPOUSE

4.5 A person shall be considered a surviving spouse for the purposes of this Section 4 only if,

(a) immediately after a participant's death, such person is a widow or widower of such participant within the provisions of the Social Security Act, except that where such Act requires reference to the law of the District of Columbia, the applicable law shall be that of the state of Pennsylvania, and

(b) with respect to a participant who dies after retirement and after attainment of age 65, such person was

married to the participant not later than the participant's 65th birthday or his date of retirement, whichever is later; provided, however, that with respect to a person who married a participant after such participant's retirement and 65th birthday, such person was married to the participant for at least three years at the time of the participant's death. In any event no more than one person shall be considered a surviving spouse for the purposes of this Section 4 and if, at the time of the participant's death, a person has been divorced from the participant and such participant has remarried, such person shall not be considered a surviving spouse.

4.6 The Plan Administrator shall make reasonable effort by an appropriate method or methods to inform the surviving spouse of an eligible participant of the existence of this benefit.

SURVIVING SPOUSE OF PART-TIME PARTICIPANT

4.7 In the case of a surviving spouse of a deceased part-time participant, notwithstanding the provisions of paragraph 4.2, the amounts set forth in such paragraph 4.2 shall be reduced on the same basis as is provided in paragraph 3.6 for the reduction of the minimum pension of a part-time participant, whether or not the minimum pension was applicable to such deceased part-time participant.

SECTION 5. DETERMINATION OF CONTINUOUS SERVICE

5.1 The term "continuous service" as used in this Plan means continuous service in the employ of one or more of the Employing Companies, except as in this Section 5 otherwise provided, prior to retirement calculated from the Employee's last hiring date (this means in the case of a break in continuous service, continuous service shall be calculated from the date of reemployment following the last unremoved break in continuous service) in accordance with the

following provisions; provided, however, that the last hiring date prior to the effective date of this Plan shall be based on the practices in effect at the time the break occurred:

(a) There shall be no deduction for any time lost which does not constitute a break in continuous service, except that in determining length of continuous service for pension purposes:

(1) that portion of any absence which continues beyond two years from commencement of absence due to a layoff or disability shall not be creditable as continuous service; provided, however, that absence in excess of two years due to a compensable disability incurred during course of employment shall be creditable as continuous service, if the Employee is returned to work within 30 days after final payment of statutory compensation for such disability or after the end of the period used in calculating lump sum payment, and

(2) the period between a break in service and the date of reemployment which results in the removal of a break in accordance with (c) below shall not be creditable as continuous service.

(b) Continuous service shall be broken by:

(1) quit;

(2) discharge, provided that if the Employee is rehired within six months the break in continuous service shall be removed;

(3) termination of employment due to permanent shutdown of a plant, department or subdivision thereof;

(4) absence which continues for more than two years, except that (i) absence in excess of two years due to a compensable disability incurred during

course of employment shall not break continuous service, provided the Employee is returned to work or retires within 30 days after final payment of statutory compensation for such disability or after the end of the period used in calculating a lump sum payment; (ii) if an Employee absent on account of layoff or disability in excess of two years returns to work with an Employing Company within three years or the excess, if any, of his length of continuous service at commencement of such absence over two years, whichever is less, the break in continuous service shall be removed; and (iii) the continuous service of an Employee whose absence was due to his being unable to work because of non-occupational disability and who returned to work prior to January 4, 1960, shall not be deemed to be broken on account of such absence, but the excess of his period of absence over six months shall not be included as a part of his continuous service.

If any Employee shall, subsequent to May 1, 1940, have entered the miltary, naval or merchant marine service of the United States, shall have had reemployment rights under the law, shall have complied with the requirements of law as to reemployment and shall have been reemployed, his continuous service shall not be considered to be broken by his absence on account of such military, naval or merchant marine service.

(c) Except as otherwise provided in (b)(2) and (b)(4)(ii) above, an Employee who on or after January 1, 1976, incurs a break in continuous service prior to becoming eligible for an immediate or deferred vested pension and who is reemployed by an Employing Company shall, upon completion of one year of continuous service following such reemployment, have such break in continuous service removed if the period of continuous service accrued prior to the break is in excess of the period between the break and the date of reemployment.

5.2 For the sole purpose of determining eligibility for pension pursuant to paragraph 2.1 or unreduced pension commencing at age 65 pursuant to paragraph 2.8, an Employee who on or after January 1, 1976, incurs a break in continuous service by reason of quit or discharge prior to becoming eligible for an immediate or deferred vested pension, who is reemployed within one year of such quit or discharge without having his break in continuous service removed pursuant to paragraph 5.1(b)(2) above and who upon incurring a subsequent break in continuous service has less than 10 years of continuous service calculated in accordance with paragraph 5.1 above shall receive credit for the continuous service accrued prior to the first break described above and for the period between such break and the date of reemployment plus any other continuous service which would result from application of paragraph 5.1(c) taking into account service credited pursuant to this paragraph.

(a) Subject to action by the General Pension Board, the number of years of continuous service of any participant shall be conclusively determined for all purposes of this Plan by the Plan Administrator. Service with an Employing Company not covered by this Plan or service with a subsidiary company which has not adopted this Plan, with an affiliated company or with a joint venture may be granted under this Plan in accordance with rules and regulations adopted by the General Pension Board; provided, however, that such rules and regulations will apply uniformly to all similarly situated individuals.

(b) For all participants who were former employees of another employer designated by the General Pension Board as being engaged in activities relating to or affecting the interests of any of the Employing Companies or a predecessor company, the number of years of service (excluding any period of service for which the participant is entitled to a vested benefit under another pension

plan) with such other employer shall be included in continuous service for purposes of this Plan; provided, however, that all eligible employees of such other employer who shall become employees of an Employing Company shall become participants in this Plan and shall be treated uniformly so that the inclusion of such service in continuous service does not result in discrimination in favor of employees who are officers, shareholders or highly compensated, and provided, further, that no participant first employed on or after July 31, 1968, shall be given credit for any service in the employ of any employer other than an Employing Company unless such employer either becomes an Employing Company or is merged into an Employing Company or unless this Plan shall be amended to specifically provide for the crediting of service in the employ of such employer.

SECTION 6. REEMPLOYMENT AFTER ATTAINMENT OF PENSION ELIGIBILITY

APPLICABILITY OF OTHER SECTIONS

6.1 Except as otherwise provided in this Section 6, the provisions of all other sections of this Plan shall be applicable to any participant who is reemployed by an Employing Company after having been retired and receiving a pension or after having attained eligibility for a deferred pension under this Plan or under another pension plan of Bethlehem Steel Corporation and Subsidiary Companies (herein "prior Plan").

EFFECT ON PENSION AND AUTOMATIC 50% SPOUSE OPTION

6.2 (a) Any participant who has been retired and receiving a pension under this or a prior Plan shall upon reemployment by an Employing Company have his pension discontinued.

(b) If such participant had an Automatic 50% Spouse Option pursuant to paragraph 3.15 of this Plan in

effect, such Automatic 50% Spouse Option shall become null and void upon reemployment; provided, however, that if such participant has a spouse on the date of reemployment who was eligible to receive payments under the Automatic 50% Spouse Option upon the participant's death, such participant will be automatically covered by Pre-Pension Spouse Coverage pursuant to paragraph 3.14 of this Plan effective as of the date of reemployment unless the participant revokes such coverage within 30 days of reemployment. Upon subsequent retirement, a reemployed participant shall have the right to accept or reject the Automatic 50% Spouse Option in accordance with paragraph 3.15.

CONTINUOUS SERVICE OF REEMPLOYED PARTICIPANT

6.3 Any participant who has been retired and receiving a pension or

FOR INTER-OFFICE CORRESPONDENCE
IRON MINES COMPANY OF VENEZUELA
CARACAS, D. F.

September 6, 1966

FILE REFERENCE CV-6518
FROM W. H. Shingler, Vice President and Manager, Caracas
TO L.D. Jameson, Manager of Operations, El Pao
SUBJECT H. O. PERSONNEL TERMINATION PAYMENTS IN VENEZUELA

The case of the treatment of Venezuelan termination payments for H. O. Personnel was discussed with Mr. Tebelman on August 4, 1966 in Bethlehem.

The policy which resulted the above discussion is as follows:

When a H. O. employee such as Brisky or Jackson terminates his employment in Venezuela and transfers to another Bethlehem operation, or retires with pension rights you will make clear to him the conditions of A. M. Rupkey to A.F.P. letter dated February 16, 1959. Also pertaining to the same subject are letters AFP — J. M. Larkim of January 2, 1959 and AFP — LCY of April 1, 1959.

The above will assure us that the H. O. employee understands and indicates his preference with regard to any termination payments, pension etc., that pertain to his case.

After you advise the office of the decision the employee makes the Bethlehem office will be notified. This procedure will insure that the employee understands his rights with the company and the transfer or termination conditions for his services in Venezuela.

By policy final disposition is made in the Bethlehem office but it is important to clarify the local aspects and have it on record with concurrence from Bethlehem prior to departure of the employee.

If copies of the above letters are not in your files you may obtain them from accounting or this office.

W. H. Shingler

MATTERS TO BE DISCUSSED WITH MR. C. G. TEBELMAN

1. What is the deadline for me to decide whether I want to receive my severance pay and give up my Venezuelan service for retirement?

2. El Pao received only one booklet that describes the current retirement plan. W. A. Jimenez would like to have at least one more book.

3. I will leave Bethlehem on February 28 for a week of vacation in El Paso, Texas, and meet Mr. Leach in New York on March 7, for trip to Spain. I would like to know when I can take my next regular vacation — from Spain. Will it be one month each year or something else? I would like to have the information so that I can arrange for my next medical exam.

4. I would like to have any salary information — the places it will be paid, the amounts, and the currencies.

5. Carl Christmann.

6. I have no Spanish visa. I understand U. S. citizens do not need visas to enter Spain. Do I need any special documentation to cover my residence there?

L.D.J.

Bethlehem Steel Corporation
BETHLEHEM, PA 18016

March 23, 1979

Mr. L. D. Jameson
1705 Princess Jeanne Drive
Las Cruces, New Mexico 88001

Dear Dowd:

This is with reference to your meeting on Friday, March 2, 1979, with H. J. Ashe and M. H. Davidson, and your comments/questions about the memorandum dated February 15, 1979 (See Attachment A) concerning the mutually agreed upon terms of your impending resignation effective February 29, 1980.

A list of your comments/questions (See Attachment B) has been prepared and reviewed with appropriate Bethlehem departmental representatives. The following is our reply to your questions (references are to Attachment B):

1. With reference to item #1 and the question concerning your termination date with Sierra Rutile Limited, we have reviewed this matter with our Accounting Department and have been advised that your tax settlement in Sierra Leone for 1979 was Le 529.14 and that you can deduct this as a Foreign Tax Credit. Since you performed work and were a resident in Sierra Leone in January, 1979, and received wages from which taxes were deducted for such services while employed with SRL, the effective date of your termination from SRL is, and will remain, January 31, 1979.

2. With reference to your questions under item #2, the salary paid, or to be paid, to you for the period February 1, 1979, to February 29, 1980, will be considered United States source income, and, as such, will be subject to Federal Income Tax withholdings based on your W-4 Form on file showing you are

married claiming two exemptions. Accordingly, social security deductions will be made.

Since you will not be residing in Pennsylvania, Pennsylvania State Income Tax and local taxes will not be deducted. Accordingly, such taxes, which were deducted from your February, 1979 earnings, will be refunded to you.

We prepared a "Change in Address" form for you and submitted it to L. M. Anthony's office which changed your taxing jurisdiction to Las Cruces, New Mexico, the address you submitted to us. Salary paid to you, or to be paid to you, for the period March 1, 1979, to February 29, 1980, therefore, will be subject to New Mexico State Income Tax deductions. In the future, please promptly notify us of any change in your address.

3. With reference to your questions listed under item #3, your insurance coverage will continue through February 29, 1980, as if you were a member of the Management Group. As such, your stock options will be valid through February 29, 1980. As agreed, you will not be eligible for an annual physical examination in 1980.

4. With reference to your questions concerning vacation entitlements listed under item #4, we checked our records and determined that you did elect to take the January, 1979, ESVP election option as time-off and not in cash. Accordingly, the calculation under item 2.b. (Attachment A) has been changed to include the January, 1979 ESVP week election to be received in cash. Payment for this ESVP week will be based on your prior 6 months' earnings (July 1, 1978, to December 31, 1978).

The 6 weeks' calculation for 1980, however, is correct. Since your termination date with Bethlehem

will be February 29, 1980, you are not eligible for the July, 1980 ESVP election option.

5. With reference to item #5, a statement of your Savings Plan account as of December 31, 1978, will be mailed to you during March, 1979. A Savings Plan change in address form is attached for your signature. Please retain the triplicate copy for your file and return the other copies to us.

6. With reference to your questions concerning payment of storage costs and shipment of household effects; as agreed, we will continue to pay for storage of your household effects in Madrid, Spain, for a period of up to 6 months (through July 31, 1979). Shipping expenses incurred in moving such household effects to a warehouse in El Paso, Texas, or Southern New Mexico, to be designated by you, will be paid if such shipping occurs within 6 months (on or before July 31, 1979). We have confirmed arrangements with Bethlehem's Transportation Department (in New York) for you to arrange actual shipment of household effects from Madrid. You should forward a packing list and the warehouse receipt to:

W. F. Gardner, Manager of Export
Bethlehem Steel Corporation
One State Street Plaza
New York, New York 10004

A copy of the packing list and warehouse receipt is also to be forwarded to:

J. M. Crook, Assistant to Vice President
Bethlehem Steel Corporation
Transportation Department
Martin Tower
Bethlehem, PA 18016

Your employee expense vouchers submitted for January and February, 1979, have been approved.

7. With reference to item #7 concerning the use of your private airplane for transportation to El Paso, Texas, we agree to pay you for such expenses at a rate of $60.00 per hour for a single engine plane or $85.00 per hour for a double engine plane. Please submit an employee expense voucher for these expenses.

8. With reference to item #8, we will continue to forward all correspondence to you at the following address:

L. D. Jameson
1705 Princess Jeanne Drive
Las Cruces, New Mexico 88001

Please promptly notify us of any change in address. You should forward your correspondence to me at the following address:

S. J. Shale
Vice President, Mining
Bethlehem Steel Corporation
Martin Tower
Bethlehem, PA 18016

We trust that you will find the above responses to your questions acceptable.

A statement indicating you are in agreement is inserted below. Please sign both copies of the letter on the space provided, keep a copy for your records, and return a copy to me.

Yours truly,

Vice President, Mining

Attachments

Statement of Agreement:

I have reviewed the memorandum dated February 15, 1979, outlining the mutually agreed upon terms of my impending resignation with Bethlehem Steel Corporation to be effective February 29, 1980, and the replies, as stated in this letter. I find the terms of the agreement and the replies to my questions to be acceptable.

April 3, 1979
Date

L. D. Jameson

ATTACHMENT "A"

February 15, 1979

L. D. JAMESON

Following are recommendations concerning the mutually agreed upon terms of the impending resignation of L. D. Jameson:

1. Bethlehem Steel Corporation agrees to pay L. D. Jameson full salary for 6 months — spread over a 12 month period for 03-01-79 to 02-29-80. Continue carrying on payroll until 02-29-80 at which time Mr. Jameson mutually agrees to submit formal resignation:

Current Salary: $4,516/months = $54,192/year
Full Salary — 6 months = $4,516 x 6 months = $27,096
Spread over 12 months = $27,096 + 12 months = $2,258/month
(reduced monthly rate)

2. *Benefit Entitlements* under above conditions:

a. *Insurance* coverage would continue through 02-29-80

b. Eligible for 1979 and 1980 *vacation payments* (approximate figures):

01-01-79 — 1 week ESVP week = $1,042

1979 — 5 weeks vacation = (5 x $521 = $2,605) (based on reduced salary of $27,096 or $521/week)

07-01-79 — 1 ESVP week = ($695) (calculated on 2 months full salary — 4 months reduced salary)

1980 — 5 weeks vacation = (5 x $521 = $2,605) (based on reduced salary of $27,096/year or $521/week)

01-01-80 1 ESVP week = ($521)

Approximate total vacation payments = $7,468

c. *Savings Plan:* (Submitted application January 1, 1976; enrolled in Plan February 1, 1976, through July 31, 1976; Discontinued from August 1976 through December 1976 — Foreign assignment; Basic contribution resumed 01-01-77 until present time; 3% payroll deduction — basic contribution)

Options: (Based on termination effective February 29, 1980)

(1) May withdraw from Savings Plan prior to February 28, 1979, in accordance with the provisions of the Plan, whereby he would receive his basic contributions and earnings thereon, plus 6 months (02-01-76 to 07-31-76) vested Company contribution and earnings, or

(2) May discontinue basic contribution and leave balance in Savings Plan until 02-29-80, at which time he would receive his basic contribution and earnings, plus 1976 (6 months) and 1977 vested Company contribution and earnings, or

(3) May continue basic contribution of 3% on reduced salary of $2,258/month until February 29, 1980, at which time, upon resignation and termination, Mr. Jameson would withdraw from Savings Plan and receive amount due him at that time which would include 1976 and 1977 vested Company contribution and earnings.

d. *Household effects and moving expenses:* Will agree to pay storage of household effects currently in storage at Madrid, Spain, for a period of up to 6 months. Expenses incurred in moving household effects back to United States will be paid if such move occurs within 6 months.

e. *Deferred Vested Pension:* Upon Mr. Jameson's formal resignation and termination as of February 29, 1980, he will have accumulated 10 years of continuous service with Bethlehem Steel Corporation and as such would be eligible to receive a deferred vested pension at age 65 or a reduced amount at age 60. Final monthly pension calculations will be determined upon effective date of termination — February 29, 1980.

ATTACHMENT "B"

PERSONAL & CONFIDENTIAL

March 2, 1978

QUESTIONS ASKED BY L. D. JAMESON CONCERNING MUTUALLY AGREED UPON TERMS OF HIS RESIGNATION DATED FEBRUARY 15, 1979 (COPY ATTACHED)

The following questions were asked by L. D. Jameson in a meeting with H. J. Ashe and M. H. Davidson on March 2, 1979:

1. The Resident Comptroller has terminated all payment of salary in Sierra Leone as of 01-31-79. Therefore it is assumed that full salary in dollars will be paid from 01-31-79 to 02-28-79. Although R. M. McCann indicated salary in Sierra Leone could be terminated on 01-06-79, Accounting went ahead and terminated it on 01-31-79, which costs me about $1,000 additional S.L. tax.

Could termination date from Sierra Rutile Ltd. be changed to 01-06-79 (or 12-31-78)?

2. *Reference Item 1. Is salary to be paid for 02-01-79 to 02-29-80, to be classified as "derived from foreign work" and therefore considered "foreign source income"? If so, withholding and reporting on Form 1099 will continue as before, while in foreign work.

Will social security deductions be made?

"I shall not be residing in or present in Sierra Leone in 1979. Therefore, I have not completed any of the forms attached with A. T. Smith's memo of February 2, 1979. I assume that withholding from all salary paid in 1979 will be the same as if the salary were earned in the United States."

3. *Reference Item 2.a. If insurance coverage "is continued," it is assumed that both current insurance policies, including the one given to Management Group and the extra benefits in the medical and dental benefits given to Management Group will also continue during 02-01-79 to 02-29-80.

Will my three stock options be valid until 02-29-80? One is at 22⅝. It might be worth something during the next year.

4. *Reference Item 2.b. As a member of the Management Group, I assume that on 01-01-79, six weeks of vacation accrued to me and not five weeks as stated for the calculation. About two years ago an extra week of vacation was given to Management Group, regardless of service in Company.

5. *Reference Item 2.c. I request a statement of my Savings account as of December 31, 1978.

6. *Reference Item 2.d. (a) I want to have my household effects shipped from Madrid during July, 1979, to a warehouse in El Paso, Texas, or Southern New Mexico, to be designated later by me. I shall go ahead and continue paying storage costs and submitting expense vouchers for reimbursement. I assume that the Transportation Department in New York (S. Moodies' Office) can arrange actual shipment from Madrid. I can forward a packing list and the warehouse receipt to that office. Please confirm that this arrangement is all right.

(b) Expense vouchers for transportation from Sierra Leone to Bethlehem.

(Employee expense voucher submitted for approval)

7. I desire to use my own airplane for transportation to El Paso on about 03-03-79 and to submit an

expense voucher for the expenses, according to previous vacation trips. Please confirm.

8. (a) My new address for forwarding all correspondence and calls is:

L. D. Jameson
1705 Princess Jeanne Dr.
Las Cruces, New Mexico 88001
Telephone (505) 526-5971

(b) Please indicate with whom I should correspond regarding salary and entitlements.

*Reference is to terms listed in February 15, 1979 memorandum.

GENERAL PENSION BOARD
BETHLEHEM STEEL CORPORATION AND
SUBSIDIARY COMPANIES

June 12, 1980

Russell S. Johnson, Esquire
Messrs. Johnson, Johnson & Johnson
Attorneys at Law
1725 One Dallas Centre
Dallas, Texas 75201

Dear Mr. Johnson:

This is in further reference to your March 17, 1980, letter requesting (1) advice concerning the pension benefits to which L. D. Jameson, a former Bethlehem employee, is entitled and (2) a copy of the Bethlehem Pension Plan, applicable in his case.

In accordance with your request I have enclosed for your information a copy of the Bethlehem 1977 Salaried Pension Plan (the Plan) which is applicable in Mr. Jameson's case.

Mr. Jameson's employment record indicates that he was born on November 11, 1922, and that his employment with Bethlehem was as follows:

Date	Remarks
5/5/53	Employed — Iron Mines Company of Venezuela
2/28/70	Terminated employment at Iron Mines Company of Venezuela
3/1/70	Rehired for position of Manager, Progemsa in Spain
6/1/75	Transferred to position of Special Assistant to Vice President in Sierra Leone
2/29/80	Work Notice (Quit) — continuous service broken

Paragraph 5.1 of the Plan provides that "continuous service" for purposes of the Plan means continuous service in the employ of one or more Employing Companies prior to retirement calculated from the employee's last hiring date in accordance with the Plan; provided, however, that the last hiring date prior to the effective date of the Plan shall be based on the practices in effect at the time a break occurred. This language is, of course, consistent with the provisions of ERISA.

Based upon his employment with Iron Mines Company of Venezuela in Venezuela from May 5, 1953, to February 28, 1970, Mr. Jameson became entitled to separation benefits (cesantia and antiquedad), payable pursuant to Venezuelan law. Our records indicate that he was in fact paid such a severance allowance in the amount of $62,000 and that such funds were transferred to Mr. Jameson's account at the State National Bank, El Paso, Texas, pursuant to his authorization at that time.

The policy in effect at the time of Mr. Jameson's termination of his Venezuelan employment and rehiring by Bethlehem in 1970 provided that with respect to any

"terminated" Iron Mines Company of Venezuela employee who is immediately rehired at another Bethlehem operation, the payment of cesantia and antiquedad represented a "pay-off" for the years of service during which such payment was built up and unless he repays that amount under an arrangement acceptable to the company at the time he is rehired at another Bethlehem operation, he begins at such other operation as a new employee. In such a case the employee is not entitled to be credited with service prior to the date or rehire. In accordance with that policy, Mr. Jameson was given the opportunity to repay the cesantia and antiquedad payment he received based on his Venezuelan employment but he did not do so.

Based on the above, Mr. Jameson's length of continuous service for the purpose of determining his Bethlehem pension benefits is limited to his service from March 1, 1970, to February 29, 1980. Accordingly, he is entitled to a deferred vested pension in accordance with Paragraph 2.8, described beginning on page 7, of the enclosed copy of the Plan. A copy of the "Notice" sent to Mr. Jameson, showing the essential facts regarding his pension entitlement, is enclosed for your information.

I trust the above answers the questions you have raised in your March 17, 1980, letter. However, if you have further questions concerning Mr. Jameson's retirement benefits or his rights under the Plan, please feel free to contact me.

Sincerely,

D.W. KEMPKEN
Secretary, General Pension Board

BETHLEHEM 1968 SALARIED PENSION PLAN

Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies adopted January 25, 1923, as amended July 31, 1968, applicable to eligible salaried employees.

(Including Surviving Spouse's Benefit Effective August 1, 1969)

SECTION 5. DETERMINATION OF CONTINUOUS SERVICE

5.1 The term "continuous service" as used in this Plan means continuous service in the employ of one or more of the Employing Companies, except as in this Section 5 otherwise provided. The number of years of continuous service of any participant shall be conclusively determined for all purposes of this Plan by the General Pension Board. For all participants who were former employees of another employer designated by the General Pension Board as being engaged in activities relating to or affecting the interests of any of the Employing Companies or a predecessor company, the number of years of service (excluding any period of service for which the participant is entitled to a vested benefit under another pension plan) with such other employer shall be included in continuous service for purposes of this Plan; provided, however, that all eligible employees of such other employer who shall become employees of an Employing Company shall become participants in this Plan and shall be treated uniformly so that the inclusion of such service in continuous service does not result in discrimination in

favor of officers, shareholders, persons whose principal duties consist in supervising the work of other employees or highly compensated employees, and provided, further, that no participant first employed on or after July 31, 1968, shall be given credit for any service in the employ of any employer other than an Employing Company unless such employer either becomes an Employing Company or is merged into an Employing Company or unless this Plan shall be amended to specifically provide for the crediting of service in the employ of such employer.

86-988

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

L.D. JAMESON,
Petitioner,

vs.

BETHLEHEM STEEL CORPORATION
THE PENSION PLAN OF BETHLEHEM
STEEL CORPORATION AND
SUBSIDIARY COMPANIES, ALSO
KNOWN AS BETHLEHEM 1977
SALARY PENSION PLAN AND THE
GENERAL PENSION BOARD,
BETHLEHEM STEEL CORPORATION
AND SUBSIDIARY COMPANIES,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

DONA S. KAHN, ESQUIRE
ALISON PEASE, ESQUIRE
Attorneys for Respondents

Of Counsel:

HARRIS AND KAHN
14th Floor
1600 Market Street
Philadelphia, PA 19103
(215) 568-4202

Kathleen M. Mills, Esquire
BETHLEHEM STEEL CORPORATION
Martin Towers - Room 2086
Bethlehem, PA 18017
(215) 694-6750

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

L.D. JAMESON,
Petitioner,

vs.

BETHLEHEM STEEL CORPORATION
THE PENSION PLAN OF BETHLEHEM
STEEL CORPORATION AND
SUBSIDIARY COMPANIES, ALSO
KNOWN AS BETHLEHEM 1977
SALARY PENSION PLAN AND THE
GENERAL PENSION BOARD,
BETHLEHEM STEEL CORPORATION
AND SUBSIDIARY COMPANIES,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

I. COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

A. Did the court of appeals err in affirming the grant of summary judgment in favor of respondents on the grounds

that the severance policy in effect in 1970 was a plan under the Employee Retirement Income Security Act ("ERISA"), the terms of which had been correctly applied when petitioner's request for pension credit for his years of employment in Venezuela was denied?

B. In the alternative, if the reasoning of the court of appeals was erroneous, was the grant of summary judgment nonetheless appropriate, because under the terms of the 1977 Bethlehem Pension Plan, petitioner had incurred a "break in service" when he retained severance monies at the time of the termination of his employment in Venezuela?

II. COUNTERSTATEMENT OF THE CASE

L. D. Jameson, plaintiff/petitioner, filed this action on December 14, 1983, in the United States District Court

for the Eastern District of Pennsylvania. The complaint alleges that defendant/ respondents, Bethlehem Steel Corporation ("Bethlehem" or the "Corporation") the Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies (the "Pension Plan" or "Plan") and the General Pension Board of Bethlehem Steel Corporation and Subsidiary Companies ("Pension Board") violated the nonforfeitability provision of the Employee Retirement Income Security Act ("ERISA"), Section 203(a)(2)(A), 29 U.S.C. §1053(a)(2)(A), by refusing to credit plaintiff with years of service earned by him while he was employed from May, 1953 until February, 1970 by the Iron Mines Company of Venezuela ("IMCOV"), a wholly-owned subsidiary of Bethlehem Steel Corporation.

At the time of the termination of Mr. Jameson's employment by IMCOV in 1970, Bethlehem paid him "Cesantia" and/or "Antiquedades" ("C&A"), a form of severance or separation pay provided for under Venezuela law, in the sum of $56,492.00.[1/] In 1970, Bethlehem's policy regarding the payment of C&A was that recipients who were hired by other Bethlehem companies after their termination in Venezuela had the option of either retaining the C&A payment and incurring a break in "continuous service", or returning the C&A payment to the company and retaining, for pension and

---

1. Contrary to petitioner's claim, there is nothing in the record of this case other than his bold assertion which indicates that Mr. Jameson's receipt of the "C&A" was "...a vested right which cannot be waived under any circumstances." (Petition at p. 4)

other purposes, credit for their years of service in Venezuela. (Respondents' Appendix at A-4, A-13, A-14, A-24-A-26). Mr. Jameson was admittedly aware of the policy which, as manager of the Venezuelan operation, he was responsible for applying, and he elected to keep the payment of $56,492.00. (Petition at p.5)

Therefore, when Mr. Jameson was rehired by Bethlehem Mines Corporation ("Bethlehem Mines"), also a subsidiary of Bethlehem, consistent with the then existing policy and practice of the Corporation in 1970, he was characterized as a "new employee" for pension purposes. He worked for Bethlehem Mines in Spain from March 1, 1970 until May 31, 1975. From June 1, 1975 until February, 1979, he was actively employed by Bethlehem and was stationed primarily in Sierra Leone.

In February, 1979, plaintiff announced his intention to resign from Bethlehem. He negotiated the terms of his separation, which were memorialized in a written agreement dated March 23, 1979. (Respondents' Appendix at A-15 - A-24). The agreement provided, inter alia, that he would have ten years of credited pension service as of 1980. (Respondents' Appendix at A-21). In order for him to accrue the ten years of service which were necessary if he were to be eligible for pension benefits, Bethlehem agreed to continue Mr. Jameson in its employ from March 1, 1979 through February 29, 1980, at half of his regular salary. During this period, Mr. Jameson was only a nominal employee; he did not report to work. (Respondents' Appendix at A-19). Under the terms of the

agreement, plaintiff formally resigned from Bethlehem on February 29, 1980. (Respondents' Appendix at A-19).

It was only because Bethlehem allowed Mr. Jameson to continue as a nominal employee for the year from March 1, 1979 until February 29, 1980, that he qualified for a deferred vested pension under the Pension Plan, based on his years of service with Bethlehem Mines Corporation and with Bethlehem from March 1, 1970 through February 29, 1980. He has the option of electing full pension benefits at age 65 or of electing a reduced pension benefit at any time after age 60. He is now over 60 years of age and has not requested his pension.

Instead, Mr. Jameson has requested the Secretary and Plan Administrator to credit his years of service

with IMCOV in Venezuela. In a letter dated June 12, 1980, David Kempken, the Secretary of defendant Pension Board, wrote Russell S. Johnson, Esquire, an attorney for plaintiff, explaining that Mr. Jameson was not entitled to credit for his years of service in Venezuela because he had retained the C&A payment, which, in 1970, resulted in a break in his "continuous service" for pension purposes. (Respondents' Appendix at A-24 - A-26). The Pension Board reviewed and upheld the denial of pension credit for Jameson's years of employment in Venezuela.

The decision by the Plan Administrator and the Plan Trustees was based on language found in Section 5, entitled "Determination of Continuous Service," of the "Bethlehem 1977 Salaried Pension

Plan." Eligibility for and the amount of a participant's pension are determined on the basis of years of "continuous service." Under §5.1, the period of continuous service is:

> calculated from the employee's last hiring date (this means in the case of a break in continuous service, continuous service shall be calculated from the date of reemployment following the last unremoved break in the continuous service) in accordance with the following provisions; provided, however, that the last hiring date prior to the effective date of this plan shall be based on the practices in effect at the time the break occurred.... (emphasis added). (Respondents' Appendix at A-7 - A-8).

Mr. Kempken determined that Mr. Jameson was not entitled to credit for the years of his employment in Venezuela because, in 1970, the policy in effect when he left the employ of IMCOV was that if a person retained the C&A payment,

there would be a break in his service with Bethlehem for purposes of pension credit. (Respondents' Appendix at A-24 - A-26).

The record in this case contains a letter dated January 27, 1967 from G.C. Vary, then Secretary of the General Pension Board, to E.P. Leach, a Vice President at IMCOV. (Respondents' Appendix at A-4 - A-5). The letter explained that any IMCOV employee who was terminated and immediately rehired at another Bethlehem operation would receive the payment of C&A as a "payoff" for his years of service in Venezuela. Unless he repaid that money to the Company, he would begin at the other Bethlehem operation as a new employee. The letter also explained that this practice "parallels the handling of severance allowance

payments to employees who are terminated from one Bethlehem operation in the states and are subsequently rehired at that or another state-side Bethlehem operation."

Because Mr. Jameson was the Manager of Operations at IMCOV, he was notified of this practice in a September 6, 1966 memorandum, addressed to him. (Respondents' Appendix at A-13 - A-14). In 1970, when his position with IMCOV terminated, he was again informed of the policy. A February 24, 1970 memorandum initialed by Mr. Jameson and found in his personnel file includes this remark: "[w]hat is the deadline for me to decide whether I want to receive my severance pay and give up my Venezuelan service for retirement?" (Respondents' Appendix at A-14). Indeed, Mr. Jameson does not

dispute that he knew at the time he terminated his employment with IMCOV that, if he chose to keep the C&A payment, he would lose credit for his years of service in Venezuela. (Petition at p.5).

III. SUMMARY OF ARGUMENT

This Court should decline to exercise its discretion to review the grant of summary judgment in favor of the respondents and against the petitioner.

Despite petitioner's argument to the contrary, the dearth of case law on the subject, noted by petitioner himself, belies his contention that the issue raised by this case, i.e., the proper interpretation of 29 U.S.C. §1053(b)(1)(F), presents "significant and recurring problems."

An additional reason for denying the Writ in this case is that the

lower courts correctly applied the law and reached a just and fair determination.

IV. REASONS FOR DENYING THE WRIT

A. THE ISSUES RAISED BY THIS CASE DO NOT WARRANT REVIEW BY THE SUPREME COURT.

The provisions of ERISA at issue in this cause regard the nonforfeitability requirements of the Act. Section 203(b), 29 U.S.C. §1053(b), requires that, subject to a few limited exceptions, all of an employee's years of service with an employer must be credited in determining his pension eligibility. Years of service accrued before the effective date of ERISA (January 1, 1975) may be disregarded "...if such service would have been disregarded under the rules of the plan with regard to breaks

in service, as in effect on the applicable date...." 29 U.S.C. §1053(b)(1)(F). Petitioner argues that certiorari should be granted to review this case because of "significant and recurring problems" of interpreting this provision, §1053(b)(1)(F).

Petitioner, however, cites only three decisions in support of this claim. The paucity of published decisions involving this issue suggests that it is not of pressing importance. Also, a review of the decisions cited by petitioner shows that the analyses used by the courts are not incompatible but rather reflect the differing factual circumstances of the cases.

In Snyder v. Titus, 513 F.Supp. 926 (E.D. Va. 1981), trustees of a union pension plan sued a pensioner, seeking

repayment of benefits allegedly improperly paid to him. Relying upon the terms of a 1959 plan, the trustees claimed that, because of "breaks in service" in 1954, 1955, 1956 and 1958, the pensioner was not eligible for benefits.

The defendant applied for pension benefits on May 1, 1978, claiming that he had at least 25 years of credited service. The trustees ultimately decided that he was ineligible because of the break-in-service rule contained in the 1959 pension plan; that is, he had not worked in covered employment for more than 250 hours in any quarter during the years 1954, 1955, 1956 and 1958. The subsequent revisions of the plan did not contain any language referring to a pre-1959 break in service. The 1976 plan, which was in effect at the time he

applied for his pension, explicitly defined a break in service as the failure to earn any future service credits for three consecutive plan years after July 1, 1958.

Holding that the plan in effect at the time application for pension benefits is made should apply, the Snyder court found that the trustees' use of the 1959 rules was arbitrary and capricious and must be reversed. Because the 1976 plan defined a break in service as the failure to earn any future service credits for three consecutive plan years after July 1, 1958, the court determined that pre-1959 breaks in service had been defined out of existence by the 1976 plan. The terms of the pension plan at issue in Snyder therefore differ markedly from those found in the 1977 plan in this

case, which require that calculation of "...the last hiring date prior to the effective date of this plan shall be based on the practices in effect at the time the break occurred...." (Respondents' Appendix at A-8).

The Snyder court also found that there was nothing in the language of 29 U.S.C. §1053(b)(1)(F) or in the legislative history of ERISA prohibiting a plan from expressly providing that a break in service occurring before the effective date of ERISA shall be governed by the rules in effect at the time of the break. However, since the plan in question did not refer to other rules as governing a particular period of employment, the court in Snyder held that the trustees could not, under §1053(b)(1)(F), deny the defendant his pension based on

the 1959 break-in-service rule. Because the 1977 plan in the instant case does contain a reference to earlier practices for determining the last date of hiring, the holding of Snyder does not conflict with the reasoning of the two lower courts in this case.

Like the Snyder decision, Govoni v. Bricklayers, Masons and Plasterers International Union, 573 F.Supp 82 (D. Mass. 1983), aff'd 732 F.2d 250 (1st Cir. 1984), can be harmonized with the decisions of both the court of appeals and the district court in this case. Plaintiff Govoni sued, alleging that the trustees of his union pension plan had violated the nonforfeitability clause of ERISA, 29 U.S.C. §1053, in their refusal to credit certain years of plaintiff's employment, based on terms of the 1962

version of the pension plan. Govoni argued that defendants should have used the pension plan rules in effect in 1979 when he made his application for pension, and under the terms of that plan, he had not incurred a "break in service."

While the district court held that the pension plan in effect at the time an employee applies for his pension or his application is ruled upon is the controlling plan, it nonetheless affirmed the denial of pension credits for Govoni's employment before 1965.

The 1976 plan, which was in effect in 1979, contained a significant ambiguity. The first paragraph stated that a "break in service" may occur "on or after June 1, 1962" provided that the conditions of both subparagraphs (a) and (b) are satisfied. However, subparagraph

(b) included a condition that could not be satisfied until after August 1, 1976. Despite this ambiguity, the district court found that the trustees' interpretation of the plan was reasonable. They treated the phrase "commencing August 1, 1976" as the effective date of subsection (b) and that any break in service prior to that date could occur upon satisfaction of subsection (a) by itself. The record in the case showed that the provision regarding the "rule of parity" found in subsection (b) had been included in the 1976 plan for the sole purpose of complying with ERISA and was intended to have only prospective effect.

Other factors which convinced the court of the reasonableness of the trustees' interpretation included the fact that the trustees had applied the

1962 rule in a consistent and uniform manner and that during the period from June 1, 1962 until August 1, 1976 publications describing the break-in-service rule were distributed to participants and plaintiff knew or should have known about the rule when he resumed covered employment in 1966. The Govoni court also found that the trustees' interpretation did not violate the substantive provisions of ERISA because 29 U.S.C. §1053(b)(1)(F) expressly permits pension plans to adopt a dual break-in-service scheme: one which will apply to breaks in service after the effective date of ERISA and one which permits the old rules to apply to breaks occurring before the effective date of ERISA.

The third case cited by petitioner for the proposition that this

court should grant certiorari because of significant and recurring problems of interpretation of 29 U.S.C. §1053(b)(1)(F) is Tanzillo v. Local Union 617 International Brotherhood of Teamsters, 769 F.2d 140 (3d Cir. 1985). The decision in Tanzillo, however, is not inconsistent with the decision in this case.

Mr. Tanzillo worked for a company called Aero Transportation for sixteen years. For two of those years, his employer was required to make pension plan contributions to the union fund; however, it never actually made those contributions. Thereafter, he worked for another company which contributed to another pension plan which was recognized by the union for reciprocity purposes. When Tanzillo applied for pension benefits in 1979, the trustees denied him

credit for 19 quarters because he had suffered a "break in service," as defined in the 1962 plan which was in effect at the time Tanzillo worked for Aero. Mr. Tanzillo argued that he had not suffered a break in service under the terms of the 1978 plan, which was in effect at the time he filed his claim for pension benefits.

The Court of Appeals found that the 1978 plan did apply; however, since it provided that the applicable break-in-service rule was the one in effect at the time the break occurred, the rules of the earlier plan controlled.[2/] The Third

---

2. The 1978 plan in the Tanzillo case provided that pension eligibility "shall be determined under the terms of the plan...in effect at the time

[Footnote continued on next page]

Circuit affirmed the decision of the pension board denying Mr. Tanzillo credit for 19 quarters because, under the terms of the 1962 plan, he had incurred a break in service in 1961. As that court pointed out in its opinion in this case, the Tanzillo court was not concerned with which plan applied since the plan in effect at retirement referred back to the earlier plan when considering events prior to the effective date of the later plan. (Petition at p.42)

[Footnote 2 continued from previous page]

> the participant separates from covered employment." This clause is similar to the one found in the 1977 Bethlehem salary pension plan which states that a break in continuous service which occurs prior to the effective date of the plan "shall be based on the practices in effect at the time the break occurred...."

These decisions do not support petitioner's contention that certiorari should be granted because of "significant and recurring" problems in interpreting 29 U.S.C. §1053(b)(1)(F). Each of these cases presented different factual circumstances, and any differences in the courts' analyses can be explained on that basis. Certainly, any differences between the reasoning used by the courts in those opinions and that employed by the court of appeals and the district court in this case are not significant enough to warrant review of this case by the United States Supreme Court.

B. THE COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW THIS CASE AS THE LOWER COURTS CORRECTLY APPLIED THE LAW.

The crucial issue in this case is whether the lower courts properly

granted summary judgment in favor of defendant/respondents on the basis that the Plan Administrator and Trustees did not act arbitrarily or capriciously in denying petitioner pension credit for his years of service in Venezuela. A review of the record and the applicable law shows that both the district court and the court of appeals, albeit by different analyses, reached the correct determination.

The United States Court of Appeals for the Third Circuit affirmed the district court's grant of summary judgment in favor of respondents but on a different theory than was employed by the lower court. The court of appeals noted that under 29 U.S.C. §1053(b)(1)(F) an employer may disregard years of service accrued before the effective date of

ERISA (January 1, 1975) if those years would have been disregarded under "the rules of the plan with regard to breaks in service, as in effect on the applicable date." The court looked first at the 1968 pension plan, which was in effect at Bethlehem when Mr. Jameson incurred his break in service in 1970 by choosing to retain the C&A monies. That plan provided that pension benefits would accrue during "continuous service" but did not define either continuous service or a break in service. The Third Circuit did note, however, that, even if it were to accept petitioner's argument that the 1977 plan controlled, since the 1977 plan refers to prior practices for prior events, the 1968 plan controls whether one begins the analysis with the 1968

plan or the 1977 plan. (3d Cir. Slip Op. at ¶12, Petition at p. 42)

According to the court of appeals, the crucial issue was whether the policy in effect at Bethlehem in 1970 regarding retention of the C&A money was part of the "plan in effect," as referred to in section 203(b)(1)(F), even though it was not part of the 1968 written pension plan. Since a pension plan is defined under ERISA as "any plan, fund or program" established to provide retirement income, the Third Circuit held that Bethlehem's severance policy which gave an employee the choice of either being paid the C&A at the time of his transfer or at retirement was a program providing retirement income within the meaning of the statute. The court of appeals held that the trustees had correctly applied

the 1970 plan and properly denied Mr. Jameson pension credits for his years of employment in Venezuela.

The district judge reached the same conclusion but by a different path. In his view, the starting point for any analysis was the plan in effect at the time Mr. Jameson filed his pension claim in 1980, which was the 1977 plan. The district court then looked at §5.1 of that plan which states that continuous service is measured from the employee's last hiring date to the date of his retirement. It contains, however, a proviso that "...the last hiring date prior to the effective date of this plan shall be based on the practices in effect at the time the break occurred." Because the 1977 plan required that practices in effect at the time of the break should be

applied and because there was no question that plaintiff knew about the policy pertaining to the C&A payments, the district court found that the pension board's determination that Mr. Jameson had incurred a break in service in 1970 was neither arbitrary nor capricious and therefore must be upheld.

The district judge rejected plaintiff's argument that since the C&A policy was not specifically included in the written plan document of either 1977 or 1968, it could not be used as a basis for denying pension benefits to plaintiff. The court reasoned that ERISA's requirement, found in section 402, that all terms and policies governing pension plans be in writing cannot be used to analyze the legality of pension plans in

effect before the effective date of ERISA.

Nonetheless, the petitioner argues:

> The legislative history of ERISA and the Congressional policy which led to the enactment of the act readily demonstrate that Congress intended to recognize only break-in-service rules which had been written in the pre-ERISA plan, and to disregard any unwritten policies or practices which were unknown to the IRS and contrary to IRS rules. (Petition at p. 11)

Petitioner does not cite any authority for this assertion. Earlier in his petition he quotes the following sentence from the House Conference Report, part of the legislative history of ERISA:

> Generally, the vesting rules of the conference substitute are to apply to all accrued benefits, including those which accrued before the effective date of the provisions (subject, however, to the break-in-service rules discussed below).

(Petition at p. 6-7). This is, of course, an insufficient basis for claiming that Congress intended that pre-ERISA pension plans comply with the substantive requirements of the Act.

This argument also conflicts with section 514 of ERISA, 29 U.S.C. §1144(b)(1), which states that ERISA "shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." In an earlier decision in this case, the Third Circuit observed that section 514 mandates that "ERISA's substantive provisions are not to be used to determine the law at the time of the incident occurring before January 1, 1975." Jameson v. Bethlehem Steel Corporation, 765 F.2d 49, 62 (3d Cir. 1985) Similarly, in Berry v. Cadence Industries

Corporation, 555 F.Supp. 1284, 1289 (E.D. Pa. 1982), the district court observed that by including the provision of §1144 in ERISA:

> "...Congress meant to prevent the past conduct of pension plan fiduciaries and contributors from being judged retroactively under the standards established by ERISA simply because the conduct generated consequences subsequent to ERISA's effective date."

Prior to the effective date of ERISA, January 1, 1975, there was no legal requirement that provisions of a pension policy be contained in a written instrument. Therefore, petitioner's unsupported claim that Congress intended that the exception set forth in §1053(b)(1)(F), allowing forfeiture of pension credits under certain circumstances, only applied to pension rules or policies contained in written plans is without merit.

V. CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Dona S. Kahn

DONA S. KAHN, ESQUIRE
ALISON PEASE, ESQUIRE
Attorneys for Respondents
Bethlehem Steel Corporation, et al.

January 8, 1987
DATE

OF COUNSEL:

HARRIS AND KAHN
14th Floor
1600 Market Street
Philadelphia, PA 19003

STATEMENT OF RESPONDENT BETHLEHEM STEEL CORPORATION AS REQUIRED BY SUPREME COURT RULE 28.1

Pursuant to Rule 28.1: All of the parties to this Petition are listed in the caption. Bethlehem Steel Corporation has no parent. Its shares are publicly traded. Virtually all of its subsidiaries are either wholly owned directly by it or indirectly through its subsidiaries. None of its subsidiaries or other enterprises in which Bethlehem Steel Corporation owns an interest is known to have publicly traded securities.

PROOF OF SERVICE

DONA S. KAHN, ESQUIRE, on oath deposes and states that on the 9th day of January, 1987, three copies of the Brief of Respondents in Opposition to the Petition for Certiorari and three copies of the Appendix to the Brief of Respondents in Opposition to the Petition for Certiorari were served by first class mail, postage prepaid, on petitioner's attorney, John R. Vintilla, Esquire, 150 Plaza West Building, 20220 Center Ridge Road, Cleveland, Ohio 44116 by U.S. First Class Mail, and that all parties required to be served have been served.

DONA S. KAHN, ESQUIRE
ALISON PEASE, ESQUIRE
Attorneys for Respondents
Bethlehem Steel Corporation,
et al.

SUBSCRIBED AND SWORN TO
before me this 9th day
of January, 1987.

NOTARY PUBLIC

MICHELLE TODD [illegible]
Notary Public, Phila., [illegible] Co.
My Commission Expires May 22, 1988